United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

76-2160

To be argued by
LAWRENCE IASON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2160

MILTON MILLS,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX
FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2160

MILTON MILLS,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Milton Mills appeals from an order entered on January 9, 1976, in the United States District Court for the Southern District of New York by the Honorable Lawrence W. Pierce, United States District Judge, denying without a hearing Mills' motion pursuant to Title 28, United States Code, Section 2255, to vacate his sentence and to sentence him to no more than five years' imprisonment.

On March 31, 1975, Indictment 75 Cr. 331 was filed charging Mills with conspiracy to rob a bank, with bank robbery, and with armed bank robbery, in violation of Title 18, United States Code, Sections 371 and 2113(a) and (d) respectively. On April 3, 1975, Mills was arraigned and entered a plea of not guilty. On May 29,

1975, Mills appeared before Judge Pierce and offered to plead guilty to Counts One and Three of the Indictment.* After a detailed allocution pursuant to Rule 11, F.R. Crim.P., Judge Pierce accepted Mills' plea of guilty. On July 15, 1975, Judge Pierce sentenced Mills to five years' imprisonment on Count One and to twelve years' imprisonment on Count Three, both terms to run concurrently.

On August 25, 1975, Mills filed a *pro se* motion for a reduction of sentence pursuant to Rule 35, F.R.Crim. P., to which the Government responded by affidavit on September 2. While purportedly made pursuant to Rule 35, Mills' motion made the same allegations and sought the same relief subsequently sought in this petition. On November 24, 1975, the District Court entered an order denying Mills' motion, and on January 9, 1976, the District Court filed a memorandum again denying the motion. The January 9, 1976, order noted that the motion was in the nature of an application under 28 U.S.C. § 2255.

On March 9, 1976, Mills filed a *pro se* petition pursuant to Title 28, United States Code, Section 2255, seeking to vacate his sentence and to be sentenced to no more than five years in prison. The Government was not served with a copy of this petition and was not advised that the petition had been filed until this appeal was brought. On September 24, 1976, the District Court denied Mills' petition without a hearing, relying on the transcripts of Mills' guilty plea and sentencing.

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* Count One was the conspiracy count and Count Three was the armed bank robbery count.

Statement of Facts

The Bank Robbery

Indictment 75 Cr. 331 charged Mills and unknown accomplices with conspiracy to commit armed bank robbery, with bank robbery and with armed bank robbery. On March 26, 1975, Mills and his accomplices robbed the Chase Manhattan Bank, 1650 Gun Hill Road, Bronx, New York. Mills and his accomplices pulled revolvers from their pockets and told the bank customers and employees not to move. One of Mills' accomplices vaulted over the counter and grabbed some money. Then all three bank robbers fled. When Mills was arrested, he had an airlines bag that contained cash that matched the serial numbers of money taken from the bank. Mills also had with him a revolver taken from a bank guard and securities taken from a safety deposit box at the bank (A. 12a-18a).*

Mills' Petition

On March 9, 1976, Mills filed the present petition pursuant to Title 28, United States Code, Section 2255 (A. 40a-44a). In it, he claimed that his guilty plea had been the product of negotiations between his lawyer and the prosecutor under which he was assured of receiving no more than five years imprisonment, and that this bargain had not been observed. He also stated that at the time of his sentencing the District Court indicated that it was unaware of any plea bargaining.

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* Citations to "A." refer to pages in the Government's appendix attached hereto.

The District Court's Decision

In an endorsement order dated September 21, 1976, Judge Pierce denied Mills' petition. He noted, first, that the same claim had been raised in Mills' prior Rule 35 application to the Court, and that in denying that application the Court had treated the application as a Section 2255 petition and had denied it. Judge Pierce also reviewed the records again and found that the transcript of the guilty plea and sentence disposed of the matter. (A. 46a).

ARGUMENT

The District Court Properly Denied Mills' Petition.

In his petition and again on this appeal, Mills claims that since his attorney promised him that if he pleaded guilty he would receive no more than a five-year sentence, his sentence of twelve years should be vacated, and his case remanded for re-sentencing in conformity with this understanding. The denial of this petition by the District Court, without holding a hearing and based solely on the transcripts of Mills' guilty plea and sentencing, was entirely proper for each of three independent reasons.*

First, the law in this Circuit is clear that when a conviction is attacked because of claimed statements made by a lawyer to his client, the District Court hear-

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* In addition to the grounds discussed in this brief, which address the merits of Mills' claim, Judge Pierce was fully justified in denying Mills' petition on the ground that the same issue had already been raised and denied on his purported Rule 35 motion. *Sanders* v. *United States*, 373 U.S. 1, 15-19 (1963); *United States* v. *Romano*, 516 F.2d 768 (2d Cir.), *cert. denied*, 423 U.S. 994 (1975).

ing such a claim may properly disbelieve and dismiss the petition in the absence of an affidavit from the attorney confirming that the statements were made. *United States* v. *Wisniewski*, 478 F.2d 274, 284 (2d Cir. 1973); *United States* v. *Santelises*, 476 F.2d 787, 790 n.3 (2d Cir. 1973); *Grant* v. *United States*, 451 F.2d 931, 933 (2d Cir. 1971). Since Mills offered neither an affidavit from his former retained attorney nor an explanation for the absence of one, Judge Pierce was justified in denying Mills' petition on this ground.

Second, the record of Mills' guilty plea and sentencing each demonstrate in the most explicit terms that he was not under any misunderstanding of his situation, since the precise issue now raised by Mills was fully explored on the record. At the time of the guilty plea, Judge Pierce conducted an unusually meticulous allocution. Counts One and Three were read to Mills, who said that he wanted to plead guilty. Judge Pierce already had established that Mills was twenty-eight years old and could read, write, speak and understand English. The Court then determined that Mills, a licensed electrician, had consulted with his retained attorney. (A. 4a-7a). The Court next advised Mills of the full panoply of rights surrounding the right to a jury trial and established that Mills understood his rights (A. 7a-8a). When Judge Pierce asked whether Mills had been promised anything to induce him to plead guilty, Mills said:

> "Well the government indicated if I was to plead guilty, consideration will be shown, I would receive the sentence not to exceed five years."

(A. 8a).

The Assistant United States Attorney immediately advised the Court that no promises or representations had been made either to Mills or to his attorney and that he

had told Mills' attorney he would not even venture any predictions regarding sentence. The Assistant further said the only representation made by the Government was that if Mills pleaded guilty to Counts One and Three, the Government would consent to a dismissal of the bank robbery charge, count two. Finally, the Assistant told the Court that his only direct contact with the defendant outside of Court was on the day when Mills was presented before the Magistrate for arraignment, and that there has been no discussion concerning a plea at that time (A. 8a-9a).

Milton Rosenberg, Mills' retained attorney, then stated that the only representation made to Mills was that if he pleaded guilty

> "The United States Attorney felt that the Court in its sentence would take that into consideration as against the defendant going to trial and forcing the government to go through a lengthy expensive trial." (A. 9a).

Mr. Rosenberg went on to say he had told Mills that

> "In the Federal Court I know of no instance and I know of no Judge which would make a commitment at the time of the plea as to what that jurist would give as a sentence." (A. 10a).

Judge Pierce then told Mills that the Court did not commit "itself to any kind of sentence one way or the other." Mills said he understood (A. 10a). The District Court again asked Mills whether he was pleading guilty based upon any representations "as to what the sentence of this Court might be." Mills said he was not (A. 10a). Judge Pierce then ascertained that Mills

understood this and that he nonetheless wished to plead guilty (A. 11a).*

Thus, the record is crystal clear that at the time of his guilty plea, Mills was specifically made aware not only of the maximum to which he could be sentenced (A. 8a), but also that his expectation of a five year sentence was unjustified and would not be binding upon the Court. Understanding that no bargain was made or even permitted, Mills voluntarily pleaded guilty.

This Court has held that when the record shows that "the trial judge has fully and clearly inquired of the defendant's understanding concerning the plea, the process should not be frustrated by secret agreements between the defendant and his counsel." *United States* v. *Rich*, 516 F.2d 861, 862 (2d Cir. 1975). See also *Seiller* v. *United States*, 544 F.2d 554, 567 (2d Cir. 1975) ("Where the invalidity of a plea of guilty is asserted in a § 2255 proceeding, the court's duty is to examine the record of the plea proceedings to determine if the judge who accepted the plea of guilty complied with Rule 11, i.e.,

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* The matter was again explored in detail at the time of Mills' sentence. At that time, Mills told the Court that "my attorney informed me that considerations would be taken in imposing my sentence . . ." and that "if I was to plead guilty I wouldn't receive a sentence to exceed five years." (A. 21a-22a). This claim again was denied by the Assistant and by the defense counsel, each of whom detailed at some length the precise statements they had made to the defendant prior to the entry of the guilty plea. (A. 22a-24a). Judge Pierce then personally addressed Mills and, after recounting the statements made to him by Mills' lawyer and by the prosecutor, asked, "That about adds up to your not having any commitment made by anybody, if I interpret it correctly," to which Mills responded, "Yes, sir." (A. 25a). The Court then explicitly asked Mills if, understanding that there was no commitment concerning sentencing, he still wished to persist in his plea of guilty, to which Mills responded that he did. (A. 25a).

whether *that record* demonstrates that the defendant's plea was made voluntarily . . .") (emphasis in original); *United States* v. *Navedo*, 516 F.2d 293, 297 (2d Cir. 1975). It follows that since the record "conclusively establishes," Title 28, United States Code, section 2255, that Mills understood the true sentencing power of the District Judge and the absence of any bargain, his claim is without merit.*

Finally, even if Mills' claims were treated as true, the law in this Circuit is clear that he would nonetheless be entitled to no relief. As this Court has held on numerous occasions, reliance on defense counsel's mistaken estimate of sentence does not vitiate a guilty plea. *Seiler* v. *United States*, *supra*, 544 F.2d at 568 ("mistaken estimate by defense counsel of the sentence Seiller could expect to receive would not vitiate his pleas of guilty"); *United States ex rel. Hill* v. *Ternullo*, 510 F.2d 844, 847

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* It should be noted that nothing in either Mills' petition or in the record tends to show that Mills was incapable of or was precluded from understanding what the District Court told him. Mills does not claim, for example, that he could not understand English, and indeed Judge Pierce's questioning of him established that he could speak, read and understand English (A. 4a). Nor does Mills claim that his attorney told him that the plea would not be accepted unless he falsely denied that a promise had been made. See, e.g., *United States ex rel. McGrath* v. *LaVallee*, 319 F.2d 308, 310 (2d Cir. 1963); *United States* v. *McCarthy*, 433 F.2d 591, 593 (1st Cir. 1970); *Allison* v. *Blackledge*, 533 F.2d 894, 896 (4th Cir.), *petition for cert. granted*, 45 U.S.L.W. 3249 (Oct. 5, 1976). Finally, Mills does not assert that he was mentally incompetent at the time of the plea, an assertion that the Supreme Court has noted cannot be conclusively refuted by prior statements at a Rule 11 proceeding, *Sanders* v. *United States*, 373 U.S. 1, 19 (1963), see also *Fontaine* v. *United States*, 411 U.S. 213, 215 (1973); *Machibroda* v. *United States*, 368 U.S. 487 (1962) (claim of coerced guilty pleas). In short, Mills offers no suggestion why Judge Pierce could not rely on the record before him to conclude the opposite of what Mills now claims.

(2d Cir. 1975); *United States ex rel. LaFay* v. *Fritz*, 455 F.2d 299 (2d Cir.), *cert. denied*, 407 U.S. 923 (1972); *United States ex rel. Scott* v. *Mancusi*, 429 F.2d 104, 108 (2d Cir. 1970); *United States ex rel. Bullock* v. *Warden*, 408 F.2d 1326, 1330 (2d Cir. 1969); *United States ex rel. Callahan* v. *Follette*, 418 F.2d 903 (2d Cir. 1969), *cert. denied*, 400 U.S. 840 (1970); *United States* v. *Horton*, 334 F.2d 153 (2d Cir. 1964).* Since at a very minimum the record establishes that neither Judge Pierce nor the prosecutor made any promises to Mills, his petition, even when generously read, is without merit.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

LAWRENCE IASON,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

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* In *Horton* the defendant claimed that the guilty plea must be invalidated because he had relied on his attorney's claim that the United States Attorney would recommend a specific sentence —a fact which the defense attorney knew to be untrue. Judge Friendly observed that: "We are far from persuaded of the validity of any such proposition, which would afford an all too easy avenue for the invalidating of convictions on pleas of guilty." 334 F.2d at 154.

APPENDIX

Minutes of Hearing Dated May 29, 1975

[1] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Cr. 331

UNITED STATES OF AMERICA

—against—

MILTON MILLS,

Defendant.

May 29, 1975
4:30 P.M.

Before: HON. LAWRENCE W. PIERCE,
District Judge.

APPEARANCES:

PAUL J. CURRAN, ESQ.,
United States Attorney for the
Southern District of New York.

LAWRENCE IASON, ESQ.,
Assistant United States Attorney.

MILTON ROSENBERG, ESQ.,
Attorney for Defendant.

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[2] (Case called)

THE COURT: All right, present for the government, Mr. Lawrence Iason. Present for the defendant is Mr. Milton Rosenberg?

MR. ROSENBERG: Yes, your Honor.

THE COURT: And the defendant Milton Mills is present.

MINUTES OF HEARING DATED MAY 29, 1975

MR. ROSENBERG: Yes, your Honor.

THE COURT: What is your wish, Mr. Rosenberg?

MR. ROSENBERG: If your Honor please, the defendant at this time respectfully requests permission to withdraw the plea of not guilty to the indictment and offers to plead guilty to the first and third count of the indictment.

THE COURT: All right, just a moment now. Mr. Iason, I'd like you to take a look at Count 3 and tell me what you consider the essential elements of that count to be?

MR. IASON: Yes, your Honor. Count 3 incorporates by reference Count 2.

THE COURT: Where does it do that?

MR. IASON: In the language where it says the defendant in committing and attempting to commit the [3] offense charged in Count 2 of this indictment, and then it goes on to say the following, the additional language.

Therefore, the government's understanding of the elements of this offense are that the defendant, Milton Mills, is charged in Count 2, which the government contends is incorporated in Count 3, with taking approximately $50,074 in money belonging to and in the care, custody, control, management and possession of the Chase Manhattan Bank.

The element is the taking of the money from a bank, the deposits of that bank being then insured by the Federal Deposit Insurance Corporation and an additional element contained and expressed in Count 2 is that the defendant did this unlawfully, wilfully and knowingly and did so by force and violence and by intimidation.

Then in Count 3 you get the additional element that the defendant did assault and put in jeopardy the lives of persons by the use of a dangerous weapon, to wit a firearm.

MINUTES OF HEARING DATED MAY 29, 1975

MR. ROSENBERG: Your Honor, if I may, your Honor——

THE COURT: Yes.

MR. ROSENBERG: I don't think it is contended anywhere that Mr. Mills did physically assault anybody. [4] On the interrogation as to the plea, I don't think he could admit that because I don't think that's contended and I don't think he did assault anybody unless you mean by assault pointing a weapon to anybody.

MR. IASON: If I may respond to the point raised by Mr. Rosenberg.

The government's position is that although the indictment reads did assault and put in jeopardy, in the conjunctive, of course, the ordinary rules of pleading are that the indictment is read in the disjunctive and it is sufficient to satisfy the indictment if the defendant either did assault or did put in jeopardy.

The government would contend if the defendant went into a bank and in the middle of the day during banking hours there were employees and customers of the bank in the bank at the time and the defendant had a weapon and entered the bank along with others——

THE COURT: Let me interrupt you a minute. I am reading Title 18, Section 2113 Subdivision A and I see on the second line of Paragraph A reference to from the person or presence of another. Where will I find that in Counts 2 or 3?

MR. IASON: Your Honor, I think that is contained necessarily in the taking approximately $50,000 [5] in money belonging to, and in the care, et cetera, of the Chase Manhattan Bank.

THE COURT: The bank could have been empty. Isn't that an essential element of 2113-A? Is it the government's proof that the bank was empty?

MR. IASON: No, the government's proof is that the bank was occupied at the time by customers and employees of the bank and I think it is sufficient that the government can prove that at trial, it need not be stated in the indictment. If there were any question about it, the defendant, of course, could have that information through a bill of particulars, if that were necessary and appropriate.

THE COURT: Would do what?

MR. IASON: Could have the specific information through a bill of particulars if it were necessary and appropriate.

The point I was making is that the government doesn't think it is necessary to state that it was in the full possession of a person at that time as long as the government can prove that at trial.

Yes, it is an essential element, of course, your Honor.

[6] THE COURT: All right. Well, let's proceed. Please stand, Mr. Mills.

BY THE COURT:

Q. What is your name, sir? A. Milton Mills.

Q. How old are you? A. Twenty-eight years old, sir.

Q. Date of birth? A. Beg your pardon?

Q. When were you born? A. January 22, 1947.

Q. You do read, write, speak and understand English? A. I do.

THE COURT: The clerk will read Counts 1 and 3 to the defendant and see how he offers to plead.

THE CLERK: Milton Mills, the grand jury charges that Milton Mills, the defendant and others to the grand jury unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States, to wit to violate Title 18 U.S. Code Sections 2113-A and B.

MINUTES OF HEARING DATED MAY 29, 1975

[7] It was part of said conspiracy that Milton Mills, the defendant, and others to the grand jury unknown, would unlawfully, wilfully and knowingly, by force and violence and by intimidation, take money belonging to and in the care, custody, control, management and possession of the Chase Manhattan Bank, 1650 Gunhill Road, Bronx, New York, deposits of which were then insured by the Federal Deposit Insurance Corporation.

Overt Acts: In the furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York.

One: On or about the 25th day of May, 1975 Milton Mills, the defendant, had a conversation with another person.

Two: On or about the 26th day of March, 1975, Milton Mills, the defendant, did enter the Chase Manhattan Bank, 1650 Gunhill Road, Bronx, New York.

THE COURT: Is either of those sufficient, Mr. Iason, without the third?

MR. IASON: Yes, your Honor.

THE CLERK: Do you understand the charge in Count 1 of the indictment?

THE DEFENDANT: Yes, sir, I do.

[8] THE CLERK: How do you offer to plead to Count 1?

THE DEFENDANT: Guilty.

THE CLERK: Count 3: The grand jury further charges on or about the 26th day of March, 1975, in the Southern District of New York, Milton Mills, the defendant, in committing and attempting to commit the offense charged in Count 2 of this indictment, unlawfully, wilfully and knowingly did assault and put in jeopardy the lives of persons by the use of a dangerous weapon, to wit, a firearm. Title 18, U.S. Code Section 2113-D.

Do you understand the charge in Count 3 of the indictment?

THE DEFENDANT: Yes.

THE CLERK: How do you offer to plead as to Count 3?

THE DEFENDANT: Guilty.

BY THE COURT:

Q. All right. Now, Mr. Mills, what is your occupation normally? A. Electrician, your Honor.

Q. For whom do you work? For whom did you work? A. I did subcontracting for various contractors.

[9] Q. The last one being? A. Urban Mechanical Trades Construction.

Q. Are you married or single? A. Married.

Q. What was your date of marriage? A. Offhand I don't recall.

Q. How many children have you? A. I have two children.

Q. Their ages? A. Six and seven.

Q. How far did you go with your education? A. I completed high school. Went to five years of trade school. Took a course in order to get my electrical license.

Q. Where did you go to high school? A. Metropolitan Vocational.

Q. In New York City? A. Yes.

Q. Where did you do your vocational training? A. I was an apprentice for five years for Local 3, Electrical Workers.

Q. You received what kind of certification? A. From the Union? I was a journeyman.

Q. For how long? [10] A. About six years.

Q. What local again? A. Local 3.

Q. What union is that? A. International Brotherhood of Electrical Workers.

MINUTES OF HEARING DATED MAY 29, 1975

Q. Are you currently or have you recently been under the care of a physician or psychiatrist? A. No, I haven't.

Q. Are you feeling well today? A. Yes, your Honor.

Q. Have you received a copy of this indictment against you? A. I did.

Q. Have you gone over it with your lawyer? A. I did.

Q. Has he explained to you what the charges are against you? A. He did.

Q. Do you fully understand? A. I do.

Q. Have you told your attorney everything you know about the case? A. Yes, I did.

[11] Q. Have you held anything back from him? A. No, I didn't.

Q. Do you understand that if you did not plead guilty, you would have a right to a speedy and public trial by a jury of twelve people? A. Yes, I do.

Q. You understand that upon such a trial you would be presumed innocent unless and until the government established your guilt beyond a reasonable doubt to the satisfaction of all twelve jurors? A. Yes, I do.

Q. You understand that upon such a trial you would have the right to confront and cross-examine all the witnesses called by the government against you? A. I do.

Q. And that upon such a trial you could remain silent and no inference could be drawn against you by reason of your silence or if you wanted to, you could take the stand and testify in your own defense? A. I do.

Q. You understand that if you wanted to, you could have a trial before a judge without a jury, in which event the same things would be true, the burden would still be on the government and you would have the same [12] constitutional rights? A. Yes, I do.

Q. Do you understand you would have the right at a trial to subpoena witnesses and evidence for your own defense? A. I do.

Q. And that if your offer to plead guilty is accepted, you give up these rights with respect to this charge against you and the Court can impose upon you a sentence with respect to each count just as if the jury had brought in a verdict of guilty against you with respect to each count? A. Yes, I do.

Q. Do you understand that upon your plea of guilty to this charge, the Court has the power to impose upon you with respect to Count 1 a fine of up to $10,000 or imprisonment of up to five years or both or any combination of the two? A. Yes, sir.

Q. And do you understand that upon your plea of guilty to Count 3 being accepted, the Court has the power to impose upon you a fine of up to $10,000 or imprisonment of up to twenty-five years or both or any combination thereof? [13] A. Yes, sir.

Q. Have you been induced to offer to plead guilty by reason of any promises, statements or predictions by anybody to the effect that you would get leniency or special treatment or consideration if you pleaded guilty instead of going to trial? A. Well, I did, your Honor.

Q. Tell me about it. A. Well, the government indicated if I was to plead guilty, consideration will be shown, I would receive the sentence not to exceed five years.

THE COURT: Well, Mr. Iason?

MR. IASON: Your Honor, first of all, my communications have been strictly with the defense counsel, Mr. Rosenberg. I had no communications with the defendant since the date on which he was presented before the Magistrate and at that time there was no discussion whatsoever about a guilty plea.

There have been no promises of any kind from me personally or from any other representative of the government about a guilty plea.

In my discussions with Mr. Rosenberg, there have been no representations whatsoever nor have there been any predictions and I have told Mr. Rosenberg [14] that the government, of course, has no control over sentence and would make no prediction as to possible sentence, that the government was prepared to go to trial in this case and if the defendant wanted to plead guilty to Counts 1 and 3 the government would accept that plea but, of course, there would be no promises.

The only understanding between the government and anyone representing the defendant is that if the defendant does plead guilty to Counts 1 and 3, at the time the defendant is sentenced, if the defendant or his counsel moves that Count 2 be dismissed, the government would so consent. That's the only representation. There is nothing else and I frankly do not know to what Mr. Mills is referring.

THE COURT: Mr. Mills?

THE DEFENDANT: Yes, sir.

THE COURT: The government's representative says that no promises have been made to you of any kind in connection with sentence.

MR. ROSENBERG: Your Honor, may I address the Court?

THE COURT: Yes, sir.

MR. ROSENBERG: The only representation made to the defendant was that if he pleaded guilty and [15] I felt, I told him that the United States Attorney felt that the Court in its sentence would take that into consideration as against the defendant going to trial and forcing the government to go through a lengthy expensive trial.

I am not going into my recommendation in my discussions with the defendant because that would be confidential, what my recommendation was, but what I told his was, from my experience and from what I know about the case, that I felt that the Court would be and

usually is more lenient on sentence when the defendant admits his guilt and does not go to trial. Beyond that there was no other representations made by Mr. Iason or by me to the defendant.

THE COURT: All right, I must make clear, Mr. Mills, that all factors are taken into consideration——

MR. ROSENBERG: May I interrupt you once more, Judge?

I also made it clear to the defendant that in the state courts very often we are permitted and do negotiate time with the Judge. I also told him very clearly that in the federal court I know of no instance and I know of no Judge which would make a commitment at the time of the plea as to what that jurist would give as a sentence.

[16] THE COURT: All right. Well, Mr. Mills, on the question of what the Court takes into consideration at the time of sentence, we try to take into consideration all factors but you may not interpret that as meaning that should you plead guilty instead of going to trial, that the Court commits itself to any kind of sentence one way or the other. I ask you if you understand that fully or if you have any questions about it?

THE DEFENDANT: I understand, your Honor.

THE COURT: So I will ask you now again, have you been induced to offer to plead guilty by reason of any promises, statements or predictions by anybody to the effect that you would get leniency or special treatment or consideration if you pleaded guilty instead of going to trial? I am asking you now if you are offering to plead guilty based upon any representation made to you as to what the sentence of this Court might be.

THE DEFENDANT: No, your Honor.

MINUTES OF HEARING DATED MAY 29, 1975

BY THE COURT:

Q. Have you been induced to plead guilty by [17] reason of any fear or pressure or force or the like? A. No, your Honor.

Q. Are you presently under the influence of any substance such as alcohol, drugs or the like that might affect your ability to understand what you are doing here today? A. No, your Honor.

Q. Is there anything you wish to ask the Court about this charge or the consequences of pleading guilty at this time? A. No, your Honor.

Q. Then may we understand you are offering to plead guilty to these two counts because you believe you are guilty of each of them? A. Yes, your Honor.

THE COURT: Does the government represent, Mr. Iason, that it has sufficient evidence to make a prima facie case as to each count?

MR. IASON: Yes, your Honor, the government represents that it can prove the case and has sufficient prima facie evidence to prove the case beyond a reasonable doubt.

THE COURT: As to each count?

MR. IASON: As to each count.

[18] THE COURT: Mr. Rosenberg, do you know of any valid legal defense that would prevail if you went to trial? Or do you know of any reason why the defendant should not plead guilty to these two counts?

MR. ROSENBERG: I know of no reason why he should not plead guilty, your Honor, and place himself at the mercy of the Court.

THE COURT: And you know of no valid defense that would prevail if he went to trial?

MR. ROSENBERG: I do not.

THE COURT: You still wish to plead guilty to Counts 1 and 3?

THE DEFENDANT: Yes, sir.

THE COURT: You have to tell me with respect to each of these counts what it is that you say you are guilty of.

Let's take Count 1 first, the conspiracy charge.

What do you say happened that causes you to plead guilty to that count?

THE DEFENDANT: Do you mind repeating the question?

THE COURT: What do you say you did which causes you to plead guilty to Count 1?

[19] THE DEFENDANT: I did as is written.

THE COURT: What was that? What did you do? In your own words.

THE DEFENDANT: I agreed with the others.

THE COURT: There were some other people who were involved in this?

THE DEFENDANT: Yes.

THE COURT: And you made an agreement with them of some kind, is that what you are saying?

THE DEFENDANT: Yes, your Honor.

THE COURT: On or about when did such an agreement occur?

THE DEFENDANT: March 25, 1975.

BY THE COURT:

Q. And where, what county? A. New York.

Q. Does that mean Manhattan? A. Yeah.

Q. How many others were there? A. Two.

Q. Were they both male persons? A. Yeah.

Q. What was the agreement, that you and the others would do what? [20] A. Rob a bank.

Q. Did you have a particular bank in mind? Did you discuss or make an agreement about a particular bank? A. Sir, a bank somewhere on Gunhill Road.

Q. Do you know what the name of the bank is? A. Chase Manhattan Bank.

Q. Was that in the Bronx? A. Yes, it is.

Q. Is it your answer that on March 25th you talked with these two other persons about robbing that bank? A. Yes, your Honor.

Q. And then what did you actually do to carry out the agreement? Did you go somewhere? A. Yeah. I went to the bank.

Q. What did you do when you got to the bank? A. I pulled a gun and—

Q. Before we get to that, you got to the bank. What's the next thing you did? Did you stand outside? A. No, I went in.

Q. All right, you went inside the bank. Is that the Chase Manhattan Bank on Gunhill Road in the Bronx? A. Yes.

[21] Q. When you went into that bank, was that to carry out the purpose that you had agreed upon with the others with respect to the robbery? A. Yes.

Q. You knew it was against the law to do what you planned to do? Yes or no? A. Yes, your Honor.

Q. And you did what you did intending to do what you did, is that so? A. I did what I did intending to do what I did?

Q. Yes. A. Yes, sir.

Q. Were you awake and were you sane and not drunk, did you know what you were doing and did you intend to do what you did? A. Yes, sir.

THE COURT: Anything further with respect to Count 1, Mr. Iason?

MR. IASON: I think that covers each element, your Honor.

MINUTES OF HEARING DATED MAY 29, 1975

BY THE COURT:

Q. Let's move to Count 3. I want you to tell me what it is that you say you are guilty of with respect to Count 3. Please notice as you look at the indictment [22] before you that Count 3 makes a reference to Count 2. If you wish to turn from Count 3 to Count 2, please do so. But please tell me what it is that you say you did that causes you to plead guilty to Count 3.

First let's get the date and place and time. First the date. A. On March 26th I went into the Chase Manhattan Bank——

Q. This year—— A. Yes. This year.

Q. What was this, morning, noon or night? A. It was in the morning.

Q. All right.

What did you do? A. I pulled a revolver and——

Q. Does that mean that you took it from someplace on your body and exposed it? A. Yes.

Q. Where had it been up to that time, the revolver? A. In my pocket.

Q. You pulled it out? A. Yeah.

Q. What did you do with it? [23] A. I just held it.

Q. Did you point it at the electric fan, at an empty vault? What did you do with it once you got the revolver out? A. I just went along with the procedure.

Q. Tell me what it was. I wasn't there and I have got to decide this issue, so you tell me in some detail what happened.

You went into the bank. You had already discussed with others robbing the bank. Now you are inside the bank up there in the Bronx, the Chase Manhattan Bank on Gunhill Road, correct? A. Yeah.

Q. You pull a gun out of your pocket. What happened next, either on your part or the part of others.

Tell me what happened. A. The other two fellows pulled revolvers. One jumped behind the counter, took the money and we went out the back.

Q. Did you remain on the front side of the counter during all of that or did you go behind the counter? A. I remained in front.

Q. Were there any people in the bank? A. Yeah.

[24] Q. Were there any people on the side where you were who might have been customers? A. Yeah.

Q. Few or many? A. Few.

Q. Were there people behind the counter where bank tellers and such work? A. Yeah.

Q. Did you see them do anything once you pulled your gun, once the others pulled their guns, did you see the people behind the counter do anything, say anything? A. No.

Q. Were they indifferent? A. Were they what?

Q. Did they appear to you to be indifferent to it all, acting like you weren't there? A. Yeah.

Q. They ignored you? A. Yeah.

Q. How much money was taken, if you know? A lot of money or a little bit? A. It was a lot of money.

Q. Like what? [25] A. I don't—as far as I see it, it's 50——

Q. Did there ever come a time when you participated in looking at the money or helping to count it or seeing somebody else count it? A. No.

MR. IASON: Your Honor, if I may respond to that question, it might assist the Court to know that the information the government has, Mr. Mills was apprehended a couple hours after the bank robbery charged here and there might not have been time to count the money. That could explain that.

As far as the reaction of the people in the bank, if I might direct a question to the defendant through your

Honor, whether it would refresh his recollection whether anyone, he or any of the others with him, told the people inside the bank to get down on the floor and whether they reacted that way.

Q. Was there any direction by you or your associates to the people behind the counter, did anybody tell them to do anything? A. Yeah, "Don't move."

Q. Any further orders or commands or directions to them? A. No.

[26] Q. Were they asked to get down on the floor? A. No.

Q. Were they asked to do anything with their hands? A. No.

Q. Once they were told not to move, you heard that said, is that right? A. Yes.

Q. It was said by one of your associates? A. Yeah.

Q. Did anybody move? A. No.

Q. And then the others, both went behind the counter? A. No. Just one.

Q. And so you scooped up some money and left. When you left, who had the money? A. A guy, Phil.

Q. Did you ever see the money thereafter? A. Did I ever what?

Q. See it. See any of it. A. No.

MR. ROSENBERG: Your Honor, I wonder if you could ask him whether he saw the case in which the [27] money was in. He may not have seen the money.

Q. Was the money put into something before—I guess after all of this happened, you left the bank, is that right? A. Yeah.

Q. The three of you? A. Right.

Q. The money, do you know what the money was in? A. Yeah, it was in a box.

Q. A box. And did you ever see that box afterwards? A. I don't follow you. Did I ever see it after——

MINUTES OF HEARING DATED MAY 29, 1975

O. After you left the bank, did you see the box again? A. Yeah, when I was in the police precinct.

Q. Well, as I remember the earlier discussion on bail application, the prosecutor said that you had been apprehended coming out of some building with an airline bag on your—over your shoulder, is that right?

MR. IASON: Essentially, your Honor, if I may, the information the government has is that the defendant, Mr. Mills, was seen going into a car and arrested—he was arrested inside the car and sitting on the seat next [28] to him in the car was the airline bag which contained cash including money that could be traced to the money taken from the bank.

Also on the airlines bag in the seat next to the defendant according to the information available to the government, was a revolver taken from a bank guard.

On the floor in the car was a grocery-type bag that contained certain cash and securities taken from a safety deposit box rented by a customer of the bank. That box had been taken during the bank robbery.

All these items were in the car with the defendant, according to the information available to the government.

Q. Is that a correct statement and does it conform with your understanding of what happened? A. Yes, it does.

Q. You knew it was against the law to do these things, against federal law? A. I know it was against the law.

Q. You did what you did intending to do what you did, is that right? A. Yes, sir.

THE COURT: And is there any dispute that the money in question was in the care, custody, control, [29] management and possession of the Chase Manhattan Bank at 1650 Gunhill Road, the Bronx? Mr. Rosenberg?

MINUTES OF HEARING DATED MAY 29, 1975

MR. ROSENBERG: No, your Honor.

THE COURT: Mr. Iason?

MR. IASON: No, your Honor.

THE COURT: Mr. Mills?

THE DEFENDANT: No, your Honor.

THE COURT: Is there anything further required with respect to Count 3?

MR. IASON: Your Honor——

THE COURT: Is this bank insured by the FDIC, Mr. Iason?

MR. IASON: Yes.

THE COURT: Is there any dispute about that, Mr. Rosenberg?

MR. ROSENBERG: No, your Honor.

THE COURT: Or Mr. Mills?

THE DEFENDANT: No, your Honor.

THE COURT: Is there any dispute about that, Mr. not, the plea of not guilty to Counts 1 and 3 are withdrawn and the plea, the offer of the defendant to plead guilty to Counts 1 and 3 is accepted and the clerk is directed to enter those pleas.

A pre-sentence report is requested and counsel is asked to make his client available to the Probation Department.

MR. IASON: He is in custody, your Honor.

THE COURT: All right. We will set this down for sentence on Tuesday, July 15th at 4:30. I should be in this courtroom. Some bail. Thank you, gentlemen.

Minutes of Hearing Dated July 15, 1975

75 Cr. 331

[1] UNITED STATES OF AMERICA

—v.—

MILTON MILLS

Before: HON. LAWRENCE W. PIERCE,
District Judge.

New York, New York—July 15, 1975, 4:45 p.m.

For the Government: LAWRENCE IASON, Esq.

For the Defendant: MILTON ROSENBERG, Esq.

THE COURT: United States v. Milton Mills.

Is Mr. Iason present for the Government?

MR. IASON: Yes, your Honor.

THE COURT: And Mr. Milton Rosenberg for the defendant?

MR. ROSENBERG: Yes, your Honor.

THE COURT: And is the defendant Milton Mills present?

MR. ROSENBERG: He is, your Honor.

THE COURT: Step forward next to your attorney, sir.

[2] Are both sides ready to proceed?

MR. IASON: Government is ready, your Honor.

MR. ROSENBERG: Defendant is ready, your Honor.

THE COURT: All right.

MINUTES OF HEARING DATED JULY 15, 1975

Mr. Mills, you are now before the Court for sentencing. On May 29, 1975, you pleaded guilty to the offenses charged in Counts 1 and 3 of the indictment. In substance, you were convicted of conspiracy to violate federal law with respect to bank robbery, and with respect to the use of a firearm while robbing a bank, and also you were convicted of—well, to be specific, you were convicted of violation of Sections 371 and 2113(d) of Title 18 of the United States Code.

For the offense charged in Count 1, the conspiracy count, the law provides a maximum punishment of up to five years in prison or a fine of up to $10,000, or both, or some combination thereof.

For the offense charged in Count 3, the law provides a maximum punishment of up to 25 years in prison or a fine of up to $10,000, or both, or some combination thereof.

Mr. Rosenberg, do you know of any reason why sentence should not be imposed at this time?

MR. ROSENBERG: I do not, your Honor.

[3] THE COURT: What do you wish to say on Mr. Mills' behalf? What information do you have to present in mitigation of sentence?

MR. ROSENBERG: Your Honor, I know that there is a complete and comprehensive probation report before you, and Mr. Mills has certainly expressed his thoughts to the probation office, and I'm certain it's exemplified in your report, in addition to his background.

Your Honor, I have tried to analyze Mr. Mills' situation, and how he got into this, his background. He certainly has had much difficulty in his life. He certainly had the problems that a young man has in coming up. He has a good record from what I could ascertain.

I certainly don't feel that he was the mastermind here, and I hope that the Court, in its analysis, comes to that conclusion also. I don't believe he was, that it was

others' ideas, and it was others who sort of talked to him and got him into it.

He did do it. He did confess to it before your Honor. He certainly avoided the Government the necessity of a lengthy trial. He certainly did not commit perjury before your Honor.

In view of all this, your Honor, he commends [4] himself to your mercy and asks that you deal with him as leniently as possible.

THE COURT: Mr. Mills, do you know of any reason why sentence should not be imposed upon you at this time, or do you wish to make a statement on your own behalf, or to present any information in mitigation of sentence?

THE DEFENDANT: Yes.

MR. ROSENBERG: He would like to make a statement to your Honor, if he may.

THE COURT: Go ahead. You speak, Mr. Mills.

THE DEFENDANT: Well, all I have to say, your Honor, is my attorney informed me that considerations would be taken in imposing my sentence.

MR. ROSENBERG: I believe he means—remember, we went through that at the time of sentence, Judge.

THE COURT: I intend to inquire about that, so maybe this is the time to do it, because there is a statement of Page 4 of the presentence report which indicates that Mr. Mills has said that he was told by his attorney that unspecified "considerations" would be taken into account as far as his sentence was concerned.

Now, I think you had better make that all very clear right now, because I don't know what you are talking [5] about, and if there is some considerations involved here that you feel I should know about, you had better tell me about them fully and completely at this time.

What are they, Mr. Mills?

THE DEFENDANT: Well, my attorney informed

me that if I was to plead guilty I wouldn't receive a sentence to exceed five years.

THE COURT: Listen, if that is a condition of your plea, you are under a misunderstanding, sir. There has been no commitment by the Court. I would be very surprised if there was a commitment by the prosecutor.

Was there any commitment by the Government?

MR. IASON: No, sir, your Honor.

If I may indulge and ask the Court's indulgence for a time, briefly, this came up at the time of the plea.

MR. ROSENBERG: We went into it in great length with your Honor at that time.

THE COURT: I have some recall of that, Mr. Rosenberg.

MR. IASON: I'm concerned about the state of the record, so if I may try to clarify it, Mr. Mills made a similar statement saying that he had been promised by the prosecutor—I think referring to myself, your Honor—that if he pleaded guilty he would receive no [6] more than five years.

At that time I told the Court that there had been no such promise to Mr. Mills or to his attorney, that I had had no communications with Mr. Mills except for when he was interviewed immediately prior to his presentation before the magistrate, and there had never been any discussion between Mr. Mills and me about a guilty plea, sentencing, or anything else, except a brief discussion about Mr. Mills' background and perhaps the facts of the defense.

In my discussions with Mr. Rosenberg, I stated, and I think he can corroborate it, at the time of the guilty plea, that I would make no representations, no speculations or in any other way discuss anything about the sentence. That was entirely the province of the Court. And the Government was prepared to go to trial.

If Mr. Mills instead wanted to plead guilty to these counts, that was in effect the entire indictment, and the

Government certainly would not object, but that this was a case where the Government was quite prepared to go to trial and was in no way seeking any plea from Mr. Mills.

The Government was told by Mr. Rosenberg that there would be no cooperation from Mr. Mills as far as the [7] investigation and discovery of the identity of the other perpetrators in the offense, so there was no plea bargain, there was no promise made by the Government, no representations, no speculations, and I think that this was fully gone into at the time of the guilty plea.

As a matter of fact, my notes reflect that after the Court brought out that there had been no promises made, your Honor asked Mr. Mills whether he understood, and he said he understood. I thought this was resolved at that time.

THE COURT: Well, Mr. Mills?

MR. ROSENBERG: Your Honor, may I——

THE COURT: Yes, counsel.

MR. ROSENBERG: I know your Honor is certainly very busy, involved in the pretrial. All of this was gone into in great, great length with Mr. Iason and myself with the Court and Mr. Mills, and, frankly, I felt there was a misunderstanding.

I did say this to Mr. Mills: I said it at the time of the plea and I will say it again. I told him that the Court usually takes into consideration the fact that a defendant who is guilty acknowledges his guilt to the Court, does not make the Government go to trial, does not commit perjury by taking the stand and [8] lying about what may have happened, and that I personally felt that if he went to trial and took the stand that the sentence would be greater than if he did admit his guilt if he was guilty.

Now, that is the extent to which I've told Mr. Mills. And I also told Mr. Mills that in the federal court that

the judge—that I know of no judge, particularly, and I speak in the Southern District, that will commit himself as to time at the time of plea, or bargain to the extent of how much time he would give at the time the plea was taken.

I made all of those points clear.

I believe just about all of that, and much more, was gone into at the time the plea was taken. I don't know what Mr. Mills' thoughts are or where he got the figure of five years. I just don't understand it.

THE DEFENDANT: Well, Mr. Mills, what do you have to say, first as to Mr. Iason—the prosecutor's statement just made, and then, next, as to your counsel's statement, or for that matter, what do you want to say quite apart from what they have said?

Let's take your response to Mr. Iason's statement first.

THE DEFENDANT: Well, with no further delay, I [9] would wish your Honor to impose the sentence.

MR. ROSENBERG: No, the Judge wants to know if——

THE COURT: I first have to know whether you are saying anything different than Mr. Iason has said with respect to the Government attorney's role or prior conversation with you or your counsel in this matter.

Is there anything different that you say was said to you by Mr. Iason or anybody else on behalf of the Government?

THE DEFENDANT: Your Honor, I would not like to perjure myself, and I'm just only revealing what was led me to believe.

THE COURT: By Mr. Iason?

THE DEFENDANT: By my attorney.

THE COURT: All right. So not by Mr. Iason or any other Government person; is that the import of your answer?

THE DEFENDANT: Yes, sir.

THE COURT: Now let's take Mr. Rosenberg, your attorney. You just heard his explanation, his statement, and you also heard it when we took the plea. Oh, let's see, that was on May 29, 1975, when we did go into this at [10] some length. Now he's just further explained what he says he told you, and if you want time to talk with him about this matter, you may take it now. Otherwise, I am going to go ahead, as you have requested, on the assumption that it's your understanding that no commitment has been made by the Government with respect to what your sentence will be, certainly no commitment has been made by myself or anybody else on the judiciary end with respect to what the sentence would be, and according to Mr. Rosenberg, he has indicated that he has told you what he understood the course of conduct to be from his vantage point, but he says he told you that no commitment could be made as to any sentence, and that he understands the practice in this Southern District to be that no judge makes any commitment.

That about adds up to your not having any commitment made by anybody, if I interpret it correctly.

THE DEFENDANT: Yes, sir.

THE COURT: Then am I to understand that, as you stand there in the well this afternoon, it's your understanding that no commitments have been made to induce you to plead guilty to any charge with respect to this indictment?

THE DENFENDANT: That is true.

[11] THE COURT: And it is your wish to plead guilty as you previously stated with respect to Counts 1 and 3 in this case?

THE DEFENDANT: Yes, sir, I am.

THE COURT: All right. Does the Government have any comment at this time at all?

MR. IASON: Your Honor, I'm reluctant to go into this in further detail, but I wonder if it would be appropriate to ask Mr. Mills then what was the basis for his statement that he had been led to believe that he would get only five years, at most.

THE COURT: I really don't think there is anything left to explore. The concern of the Court must be whether or not the plea was induced by virtue of any misunderstanding or by virtue of any commitments or promises which Mr. Mills expects to be carried out at this time, and as I understand his answer—and you correct me, Mr. Mills, if I'm wrong—there is no misunderstanding about what the sentence will be here. The sentence may be as high as 25 years on one of these counts, plus a fine of $10,000, or it may be less than that. On the other count, it may be as high as five years in prison plus a fine of up to $10,000, or less than that. [12] In fact, the Court could impose upon you both sentences, the 25 years in prison and the $10,000 fine, and it could impose upon you the five years in prison and the $10,000 fine, to be served consecutively.

You understand all of that?

THE DEFENDANT: I fully understand, your Honor.

THE COURT: And I do not understand at this point that at the time you pleaded guilty that there was any outstanding commitment made to you, or inducement made to you, which caused you to plead guilty at that time or to offer to plead guilty at that time.

And I also understand that there is presently in your mind no understanding of any kind by virtue of any representation made by your attorney, the Government attorney or the Court.

Now, are all of those things correct and true?

THE DEFENDANT: That is true, your Honor.

MINUTES OF HEARING DATED JULY 15, 1975

THE COURT: All right.

Let the record show that in addition to the presentence report furnished by the Probation Department, a letter was received by Miss Diane Collins on the defendant's behalf; also a letter from Mrs. Marilyn Graff of the New York Foundling Hospital, with a social service report attached.

[13] The Court has read both of those, in addition to the presentence report.

All right. Although the defendant is only 28 years of age, he has been embroiled' with the law on several occasions. These occurrences involved crimes against property.

Here, the defendant, along with three others, engaged in an armed bank robbery and escaped with cash, stocks and bonds said to be valued at over $200,000. When arrested, the defendant was said to have had in his possession a .38 caliber revolver loaded with six live rounds that was in an airline bag whch he was carrying at the time, and this revolver is said to be one which was taken from a bank guard during the bank robbery, and the defendant was also found in possession of a substantial amount of cash said to be just over $50,000.

The defendant and his wife have both been regular heroin users in the past; their two children have suffered accordingly.

The defendant was raised in an intact home in New York City. He is a journeyman electrician.

My review of his work record, Mr. Rosenberg, is that it has been spotty and irregular, for the most part.

[14] Due to the nature of the crimes committed and the hazards posed to the persons who were terrorized during the bank robbery, it is adjudged that on Count 1 the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of five years. It is adjudged that

on Count 3 that the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of twelve years. Said sentences are to run concurrently with each other.

There is one open count, Count 2. What is your wish, Mr. Rosenberg?

MR. ROSENBERG: Respectfully move that that count be dismissed, your Honor.

THE COURT: Any objection?

MR. IASON: Government has no objection, your Honor.

THE COURT: Dismissed.

All right. Thank you.

MR. IASON: I apologize for my oversight, your Honor. I want to hand up an affidavit and a suggested order for a writ of habeas corpus for the defendant to be brought over to testify in a grand jury tomorrow.

MR. ROSENBERG: I would oppose it, your Honor.

[15] THE COURT: Why should I sign it? Why should it not go to the Part I judge?

MR. IASON: Very well, your Honor. I wanted to proceed expeditiously with this. And since we are before your Honor——

THE COURT: I'm not trying to be sticky about it. It's simply that I don't wish to encumber what I have been about today by going into this matter which I know nothing about. We will let the Part I judge handle it from scratch.

MR. IASON: Yes.

MR. ROSENBERG: May I state for the record that I believe the sentence at this point I attack no further until I'm directed, if there is an appeal of some kind, and I would ask that if Mr. Iason wants to serve any papers on the defendant, or subpoena, that it be taken before the magistrate to determine what counsel should or should not be representing the defendant.

THE COURT: Good night, gentlemen.

Motion Pursuant to Rule 35 Federal Rules of Criminal Procedure

Reduction of Sentence

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Docket No: 75-331

UNITED STATES OF AMERICA

VS

MILTON MILLS

TO THE HONORABLE JUDGE: Lawrence W. Pierce, presiding in the above said Court defendant-petitioner Milton Mills respectfully moves to file this motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure, Title 18, U.S.C.A.

This motion is essentially a plea for reconsideration of sentence imposed July 15, 1975 by this Court, and a request for leniency which power is retained in the discretion of the sentencing Court, to which said motion is directed.

PETITIONER does not anticipate this motion to trigger reconsideration by the sentencing Court to reduce imposed sentence below a mandatory minimum.

PETITIONER bases reconsideration of sentence be entertained by His Honor in view of the herein, and the renegation of the prosecuting attorney to fulfill his prearranged agreement to petitioner upon sentencing.

PETITIONER realizes now, after receiving such a harsh sentence, that the promise was not performable at all, or

not within the power of the promissor, or was thus simply disregarded once the prosecutor's purpose was accomplished. Yet the fact remains that a plea bargain was made in exchange for a plea of guilty by petitioner, and that the prosecuting attorney failed to carry through on such bargain in exchange that petitioner waive certain constitutional rights and privileges.

We cannot hold that it is unconstitutional for the government to extend a benefit to the defendant who in turn extends a substantial benefit to the government and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind which affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary. Many Judges suggest that a plea of guilty may contribute to a shorter sentence because the negative circumstances frequently accompanying criminal activity are not emphasized by the prosecution and vividly recounted at trial. The American Bar Association Standards, Pleas of Guilty, 3.1 Propriety of Plea Discussions and Plea Agreements . . . states

(b) The prosecuting attorney in reaching a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:

(i) To make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;

(ii) To seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to defendants' conduct; or . . .

MOTION PURSUANT TO RULE 35 FEDERAL RULES OF CRIMINAL PROCEDURE

(iii) To seek or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere.

PLEA bargaining exists and is an open practice by the many prosecutors, and there is a judicial practice of following recommendations of sentence by the prosecutor, or that recommended sentences be tantamount to a promise of a definite term, or to dismiss certain criminal allegation in the indictment, or all of these in concert to induce defendants to plead guilty to charges.

In many localities it would be impossible to give all criminals a prompt trial if all of them or a substantial portion insisted upon a trial of their cases. If all defendants combined to refuse to plead guilty they could break down the administration of criminal justice in any court system of the nation. The truth is that a criminal court can operate only by inducing the great masses of actually guilty defendants to plead guilty, paying in leniency the price for the plea.

BEFORE the Association of the Bar of the City of New York, Police Commissioner Patrick V. Murphy stated that "In one year 94,000 felony arrests were made. Exactly 552 of them went to trial. The rest were disposed of by being reduced to lesser felonies via plea bargaining, or reduced to misdemeanors via plea bargaining, or dismissed outright", New York Times, March 24, 1972 P. 39 Column 2.

A DEFENDANT who saves the government the cost of trial should receive concessions as a result, without cost or consumption of the time of the Court. Although appellate cases directly in point are not numerous, some cases do support the position that a policy of leniency following a plea of guilty is proper, but its converse "extra" severity follows trial.

MOTION PURSUANT TO RULE 35 FEDERAL RULES OF CRIMINAL PROCEDURE

PETITIONER contends that he was sentenced as if he insisted upon trial and was found guilty receiving the imposed sentence so harshly from the Court, instead of it being entered in as a plea of guilty and being sentenced with consideration of petitioners personal character, factual prior criminal record, and family ties.

THE COURT should not impose upon the petitioner any sentence which to act as a deterrent rehabilitative, protestive, or other useful purpose afforded defendant just because defendant chose to avoid delay, offered cooperation and increased the probability of prompt and certain application of correctional measures rather than require expense of trial. Entering a plea of guilty is deserving of consideration. It has long been recognized that punishment need not be as severe if it is certain and prompt in application.

BARGAINS tend to be struck on the basis of the relationship between the prosecutor and the defendant, or his attorney. Improper pressures may be brought to bear on the defendant, and some prosecutors habitually overcharge to improve their bargaining position and in the expectation of a fixed reduction during negotiations; prosecutors give such as a standard reduction of charges or sentence offered to speed and encourage negotiations.

A MOTIVATING cause impelled the defendant to enter a plea which was a promise by the government to seek the dismissal of an additional count in the pending indictment and to recommend a favorable sentence for both the prosecution and the defendant to the Court. The latter was not extended upon plea and sentencing. In *Shelton* v. *United States*, 242 F.2d 101, a plea of guilty was vacated merely because it had been induced by a promise by the Assistant United States Attorney that he would recommend a sentence of leniency.

IF THE COURT holds threats, misrepresentations, or improper promises may vitiate the plea, a serious question

arises: "Why should any of these factors destroy the plea?" Surely it is not a sort of retributive punishment for wrongfully using force, uttering threats, or the making of promises. The vice is not that a misrepresentation was made and because of that the bargain may be rescinded. The vice is that because of that representation the accused was led to announce his guilty plea. The vice is not that threats or force were employed so that all must be undone because some officer violated petitioners Civil Rights. The vice is that because of those actions working on mind, body, and will of petitioner, he was led to take a step to making a guilty plea through motivating causes of promises by a court officer who by not possessing any real power to carry through or make good his promises, undermines the integrity, moral principle, and honesty of the judicial system. In that light he is but a common criminal of the Court, employed to deceive, coerce, and act as a separate judicial power employing unethical strategies in securing convictions for the Court who entertains such conduct.

THIS PLEA for leniency is addressed to the discretion of the sentencing Court, and may be granted if the Court decides that the sentence originally imposed was, for any reason, unduly severe. The Court may reduce the sentence simply because it has changed its mind.

In Machin vs. *U.S.* Ca 8th 1961, 291 F 2d 621 we find "Under this rule, Court had right on April 21 to correct sentence imposed on April 20, if it was illegal, and to reduce it whether it was illegal or not . . . "

In U.S. vs *Hough*, DC. Cal 1957 157 F Supp 771 the "Court first imposing a sentence of five years was authorized, within *60 days* of imposition of first sentence, to vacate sentence and reduce the same by a new sentence of two years . . ." (1966 Amendment to the rule changed 60 day limitation to 120)

MOTION PURSUANT TO RULE 35 FEDERAL RULES OF CRIMINAL PROCEDURE

FURTHER, "Upon sentencing defendant and when reconsidering prior sentence to vary its terms, Court owed no one any explanations." *U.S.* vs *Feliciano-Grafals* DC Puerto Rico 1970 309 F. Supp. 1292.

WHEREFORE and in view of the above, petitioner requests His Honor to entertain this motion for reconsideration of sentence imposed upon petitioner as truly being harsh and severe beyond cause, to so afford petitioner such remedy in sentence as requested in view of the promises made and pleading of guilty.

Respectfully Submitted:

/s/ MILTON MILLS
Milton Mills: Petitioner

FORMA PAUPERIS AFFIDAVIT

I, the above said petitioner does not own any property or property rights nor sufficient savings in which to pay the fees and cost of this foregoing motion.

/s/ MILTON MILLS
Milton Mills: petitioner

Being duly sworn, Milton Mills deposes and says that he subscribes to the foregoing motion and that the herein is true and correct to the best of his knowledge and belief.

/s/ MILTON MILLS
Milton Mills: Affidavant

Sworn to before me this 20 day of Aug. 1975:
Notary Public: T. J. Spevack
C C
U.S. Attorney
By Pro Se Clerk

Endorsement Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Cr. 331

(Pro Se)

UNITED STATES

—against—

MILTON MILLS

The motion papers within seek a reduction of sentence pursuant to Rule 35, Fed. R. Crim. P., and raise certain claims concerning alleged promises made to the defendant by the prosecutor in this case which are in the nature of an application under 28 U.S.C. § 2255.

By an order dated November 14, 1975, the Court denied petitioner's Rule 35 motion and directed the Government to provide the Court with a copy of the transcript of Mills' sentencing on July 15, 1975 so that these latter claims could be fully considered.

Having examined the files and records in this case, including the transcript of the sentencing—and without reference to the affidavit of the Assistant United States Attorney submitted on this motion—the Court concludes that there is no merit whatsoever to the allegations of Mr. Mills. Accordingly, since the petitioner is entitled to no relief, the application is denied in all respects.

SO ORDERED.

Dated: New York, New York
January 8, 1976

L. W. PIERCE
U.S.D.J.

Affidavit of Lawrence Iason in Opposition to Defendant's Motion for Reduction of Sentence

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

75 Cr. 331

UNITED STATES OF AMERICA,

—v—

MILTON MILLS,

Defendant.

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

LAWRENCE IASON, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York. I am the Assistant United States Attorney responsible for the prosecution of *United States* v. *Milton Mills*, 75 Cr. 331. I am the Assistant who advised Mills of his constitutional rights and interviewed him when he first was brought to the office of the United States Attorney after his arrest. It is my understanding and belief that no other Assistant United States Attorney has prosecuted this case or had any contact with Mills. I must be the "prosecuting attorney" referred to in the Motion filed by Mills.

AFFIDAVIT OF LAWRENCE IASON IN OPPOSITION TO DEFENDANT'S MOTION FOR REDUCTION OF SENTENCE

2. This affidavit is submitted in response to "Motion Pursuant to Rule 35, Federal Rules of Criminal Procedure, Reduction of Sentence" filed by defendant Mills. In this Motion Mills said he "bases reconsideration of sentence . . . [on] the renegation of the prosecuting attorney to fulfill his pre-arranged agreement to petitioner upon sentencing." No affidavit was filed with this Motion. The Motion itself claimed that the prosecutor made a promise but contains absolutely no information regarding the substance of the alleged promise, when it was made or to whom.

3. I have made absolutely no promises to Mills about his sentence. I have said nothing to Mills, to his attorney or to anyone that could have been construed as a promise about sentence. The only time I met with Mills was on March 27, 1975 when I interviewed him prior to his arraignment before Honorable Sol Schreiber, United States Magistrate. At the time I interviewed Mills, FBI agent Steven M. Heubeck was present. There was no discussion about sentence at that time. After March 27, 1975 I saw Mills only in court in the presence of one of his attorneys, Milton Rosenberg, Esq. and Dennis M. Beck, Esq.

4. When the attorneys for Mills asked me about a possible guilty plea, I said that if Mills pleaded guilty to Count One, the conspiracy count, and to Count Three, the armed bank robbery count, the Government would not oppose a motion to dismiss Count Two, the bank robbery count. I told Messrs. Beck and Rosenberg that the Government would make no recommendation regarding sentence. I also told Messrs. Beck and Rosenberg that if Mills wanted to cooperate with the Government in apprehending and prosecuting the other individuals re-

sponsible for the bank robbery, the Government might accept a plea to the bank robbery or armed bank robbery count and make known to the Court the fact of any cooperation but that there still could be no promise or other understanding regarding sentencing. When Messrs. Beck and Rosenberg asked me what sentence I thought the Court might impose, I said I would not speculate about sentencing. At all times I emphasized that sentencing is solely the prerogative of the Court, and I explicitly refused to discuss sentencing in any way.

5. When Mills pleaded guilty on May 29, 1975, the Court asked whether any promises had been made to induce him to plead guilty. Mills said he had been promised he would receive a sentence of no more than five years. For the Government I said there was absolutely no promise about sentence. Mr. Rosenberg, the attorney for Mills, also said there was no promise. The Court asked Mills whether he understood that there was no promise. Mills said he understood and that he still wanted to plead guilty.

6. On July 15, 1975 Mills appeared before the Honorable Lawrence W. Pierce for sentencing. When the Court gave Mills the opportunity to make a statement, Mills said "my attorney informed me that consideration would be taken in imposing my sentence" (Tr. 4 *). Mills went on to say "my attorney informed me that if I was to plead guilty I wouldn't receive a sentence to exceed five years" (Tr. 5). The Court asked me "Was there any commitment by the Government?" and I replied "No, sir, your Honor" (Tr. 5). After an extensive discussion

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* Transcript references are to the transcript of the sentencing, July 15, 1975.

reaffirming the absence of any promise about sentence, the Court asked Mills, "Is there anything different that you say was said to you by Mr. Iason or anybody else on behalf of the Government?"

> "THE DEFENDANT: Your Honor, I would not like to perjure myself, and I'm just only revealing what was led me to believe.
>
> "THE COURT: By Mr. Iason?
>
> "THE DEFENDANT: By my attorney.
>
> "THE COURT: All right. So not by Mr. Iason or any other Government person; is that the import of your answer?
>
> "THE DEFENDANT: Yes, sir." (Tr. 9)

The Court then inquired of Mr. Mills whether there had been any promise regarding sentence from Mr. Rosenberg or anyone else. Mills acknowledged that there were no commitments (Tr. 10).

7. From this record it is clear that Mills has charged repeatedly that promises have been made to him. It is equally clear that no promises have been made.

8. The Government respectfully submits that the relief sought by Milton Mills should be denied.

. . . . . .

LAWRENCE IASON
Assistant United States Attorney

Sworn to before me this
day of September, 1975

Motion Pursuant to Rule 2255 U.S.C.A. Title 28

IN THE UNITED STATES
DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Cr: 75-331

D.C. no: .....

UNITED STATES OF AMERICA

vs.

MILTON MILLS

To the Honorable Judge Presiding in the above Court, comes petitioner, Milton Mills, respectfully requesting the Court to entertain this motion collaterally attacking sentence pursuant to Title 28 Section 2255 U.S.C.A., in view of the District Courts' denial of petitioners' motion submitted under Federal Rules of Criminal Procedure, Rule 35.

Petitioner states that his sentence should be set aside and he be re-sentenced under the terms presented and made to him by and between a plea bargain of his attorney and the Assistant District Attorney. Petitioner bases such claim in view of the following . . . .

1. . . Petitioner was arrested March 26, 1975, for violation of Section 371, 2113 (d) U.S.C.

2. . . That an indictment was returned against petitioner from the Southern District Court of New York on April 1, 1975.

3. . . That on March 27, 1975, petitioner entered a plea of not guilty to (3) counts in the indictment.

MOTION PURSUANT TO RULE 2255 U.S.C A. TITLE 28

4. . . That on or about May 29, 1975, petitioner appeared before this Honorable Court, or his Honorable Judge Lawrence W. Pierce for a change of plea and sentencing. At time of this sentencing, it was made known that a plea bargaining had been discussed, wherefore, certain testimony was heard and sentencing was deferred pending the taking of a presentence report.

5. . . On or about July 15, 1975, petitioner again appeared before this Court for sentencing and revealed the terms of a negotiated plea bargain conveyed to him which his attorney said had been made by him and the Government. (Tr. 4-5 July 15, 1975). Petitioners' attorney Mr. Milton Rosenberg (Rosenberg), mentioned to the Court it was discussed at time of prior sentencing (4 above). The Court stated it was not aware of any plea bargain as to the terms mentioned by petitioner. Such non-informing the Court of a plea bargain invalidates sentence. See *Karger* vs. *United States* 388 F. Supp. 595 (1975). While the Judge may not have been entitled to know the rationale behind the plea bargain, he was entitled to know the existence of one, and the obligation to so inform him rest on either counsel. This non-informing put both counsels in an embarrassing position. Subsequently therefore, neither attorney could recall specifically what terms were agreed upon, but did indicate that a bargaining discussion had taken place (Tr. 4-5 July 15, 1975.)

The Government recanted the existence of making any plea bargain set with terms described by the defendant. Hearing both attorneys now negatively respond concerning terms of a plea bargain, added confusion to petitioners' mental state as to the customs of announcing such negotiations to the Courts. This confusion had petitioner reply to the Courts' inquiry to the negotiated plea also in the negative. Petitioner evidently mistook that this

was the standard answer to be given to the question, even though it was revealed to him a bargain had been made. Consider *United States ex rel. Scott* vs. *Mancusi*, 429 F 2d. 104 113 n.1 (1970).

Response to the Courts' questions when the plea was taken cannot under circumstances, be said to overcome the strong implication that petitioner was told by Rosenberg, and in fact believed that a promise of a (5) five year term had been made. These implications stems from Rosenberg advising him to change his plea of not guilty to guilty, a letter (Exhibit # 1) sent by Rosenberg after said plea was changed, the dismissal of connected counts in the indictment unopposed by the prosecutor, all induced petitioner a plea bargain had been struck and he therefore thinking it customary, announced it to the Court.

A clear cut statement by defense counsel that the prosecutor had made a promise, or an ambiguous remark to which petitioner gives the same meaning, has much the same psychological effect on petitioner as a promise by the prosecutor. The effect may be greater since petitioner is likely to place more trust in his attorney than in the prosecutor. Such disclosure of a bargain by Rosenberg for petitioner may even support a finding that counsel acted so improperly that, for constitutional purposes, petitioner was denied the right of effective counsel. See *Mosher* vs. *La Vallee*, 351 F. Supp. 1101 (S.D.N.Y. 1972).

On the basis of such findings and implications, the sentence should be set aside because it was induced by misrepresentation of counsel as to commitments made by the Court concerning the sentence which would be imposed. In *United States* vs. *Simpson*, 436 F.2d 162 (D.C. Cir. 1970), it was held that false representations by

defense counsel as to an agreement with the Court concerning sentence would constitute impermissible verbal coercion which would be reason to consider the plea involuntary, supporting a claim of ineffective assistance of counsel.

There is clear indication of a plea negotiation had been discussed between counsel (Tr. 4-5 July 15, 1975), a change of plea occurred subsequently and petitioners' counsel forward a letter implying said change of plea was supporting bases of bargain, wherefore it was announced in Court by petitioner at time of sentencing. In view of the above and herein, petitioner strongly believes a bargain had been made which induced his plea, but was unknown to the Court, would constitute an unkept plea bargain that requires vacation of present sentence and the being re-sentenced to term that induced petitioners' plea in view of such consideration.

Wherefore, petitioner request that this Honorable Court consider the merits of this motion and give relief as sought.

Respectfully submitted

/s/ MILTON MILLS

A True Copy
RAYMOND F. BURGHARDT, Clerk
By (Illegible)
Deputy Clerk

MOTION PURSUANT TO RULE 2255 U.S.C.A. TITLE 28

FORMA PAUPERIS AFFIDAVIT

I, the above said petitioner does not own any property or property rights, nor sufficient funds or savings in which to pay and afford the cost of this foregoing motion.

/s/ MILTON MILLS
Milton Mills: Petitioner

Being Duly Sworn:

Presents that he is the subscriber of the foregoing motion and state that the thereins is true and correct to the best of his knowledge and belief:

/s/ MILTON MILLS
Milton Mills: Affidavit

Sworn to and before me this 29 day of Dec., 1975:

Notary Public: (Illegible)

Exhibit 1, Annexed to Foregoing Affidavit

Area Code 212
WAlker 5 - 9770

MILTON M. ROSENBERG
Counselor at Law

401 Broadway
New York, N. Y. 10013
May 20, 1975

Mr. Milton Mills
Federal Detention Headquarters
427 West Street
New York, New York 10014

Re: Milton Mills v. United States
Of America

Dear Mr. Mills:

I would appreciate your telephoning me the afternoon that you receive this letter.

I must inform the Assistant United States Attorney as to our definite decision to plead guilty so that he does not prepare the case for trial. If he is forced to prepare the case for trial we cannot expect the same consideration in the plea and sentence.

Please telephone me so that final arrangements can be made.

Very truly yours,

/s/ MILTON M. ROSENBERG
MILTON M. ROSENBERG

MMR:lb

Endorsement Order

76 Civ. 1116

MILTON MILLS,

Petitioner,

—v.—

UNITED STATES OF AMERICA (Pro Se)

Petitioner Mills seeks an order vacating the judgment of conviction entered upon his plea of guilty on July 15, 1975. Essentially, the allegations are that there was a plea bargain between defendant and the Government to the effect that if defendant pleaded guilty rather than going to trial, defendant would not be sentenced to more than five years.

This exact issue has been raised before this Court through a Rule 35 motion which was denied on January 8, 1976. Although that motion was made pursuant to Rule 35, the Court recognized that certain of defendant's claims were in the nature of a § 2255 petition, and the Court treated them as such. In the order denying the application, the Court wrote as follows:

> "Having examined the files and records in this case, including the transcript of the sentencing—and without reference to the affidavit of the Assistant United States Attorney submitted on this motion—the Court concludes that there is no merit whatsoever to the allegations of Mr. Mills." *United States* v. *Milton Mills*, 75 Cr. 331 (S.D. N.Y. January 8, 1976).

Endorsement Order

Nothing in the attached petition leads the Court to reconsider its decision on the previous motion. Neither the allegations of the petition nor the letter of his counsel attached can outweigh the substance of the transcript of the sentencing hearing on July 15, 1975, during which hearing the Court inquired into this matter. A further review of that transcript re-affirms the conclusion that the plea was made voluntarily with full knowledge of the possible consequences.

Accordingly, the attached petition pursuant to 28 U.S.C. § 2255 is denied in all respects.

SO ORDERED.

LAWRENCE W. PIERCE
U. S. D. J.

Dated: New York, N. Y.
Sept. 21, 1976

★ U. S. Government Printing Office 1976—714-017-ASNY-545